(2)

No. 04-355

IN THE SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction to review the decisions of the Supreme Court of Hawaii, the Hawaii Intermediate Court of Appeals, the Hawaii Labor and Industrial Relations Appeals Board and the Director of the Hawaii Department of Labor and Industrial Relations ("Director")?

II. Whether the State of Hawaii's appointment of an allegedly biased advisory panel member, and the Hawaii State Judiciary's affirmation of the same, deprived Petitioner EMERSON M.F., JOU, M.D. ("DR. JOU") of due process under the Fifth and Fourteenth Amendments, where nothing in the record indicates recommendations of the advisory panel were relied upon by the Director or the appellate board?

III. Whether Hawaii State agencies and the Hawaii State Judiciary committed a regulatory taking by prohibiting DR. JOU from charging patients, under Hawaii's worker's compensation statutes, for physical therapy provided by staff not licensed to provide such services?

IV. Whether Hawaii State agencies and Hawaii's Intermediate Court of Appeals treated DR. JOU differently than other physicians employing third-parties to provide services incident to medical treatment, when they barred DR. JOU from billing for physical therapy provided through unsupervised staff not licensed to provide physical therapy, and thereby violated DR. JOU's Fourteenth Amendment equal protection rights?

V. Whether the Hawaii State Judiciary violated DR. JOU's due process rights and/or committed a regulatory taking when allegedly biased Hawaii appellate court judges ruled against him and allegedly in the interests of a purportedly stacked Judicial Selection Commission?

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OPINIONS BELOW

Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. ("FICOH") incorporates herein by reference, the opinions and orders cited by Petitioner EMERSON M.F., JOU, M.D. ("DR. JOU" and/or "Petitioner"). Additionally, relevant to this matter is the Decision of the Director, Department of Labor and Industrial Relations, filed November 21, 1990. *See* Appendix A.

BASIS OF JURISDICTION

There is no basis for jurisdiction in this Court. Petitioner has not met requirements necessary to invoke jurisdiction under 28 U.S.C. 1257. Further, Rule 10(b) of the Supreme Court Rules ("SCR") does not grant jurisdiction to this Court, but merely *indicates* the general character of reasons for which the Supreme Court will grant plenary consideration. *Thomas v. American Home Prods.*, 519 U.S. 913, 117 S.Ct. 282, 283, 136 L. Ed. 2d 201 (1996)(emphasis added).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

There are no Constitutional and/or Federal provisions properly before this court because Petitioner raises no Federal questions with merit or substance. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 22 S.Ct. 691, 46 L.Ed. 936 (1902). Issues raised by Petitioner were not passed upon Federal grounds, but were resolved based upon state law if at all adjudicated. *First National Bank v. Estherville,* 215 U.S.

341, 30 S.Ct. 15254 L.Ed. 223, (1910); *California v. Holladay*, 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1985).

CONCISE STATEMENT OF THE CASE

This case arises from a Complaint (Record on Appeal filed in the Hawaii Supreme Court on February 25, 2002 ["RA"] at 1-175) filed on March 5, 1990 in the Disability Compensation Division ("DCD") of the State of Hawaii Department of Labor and Industrial Relations ("DLIR") by Respondent FICOH against Petitioner DR. JOU. FICOH was the workers' compensation insurance carrier for Pao Watanabe's employer, Greeters of Hawaii, Ltd. FICOH challenged certain charges for medical treatment rendered by DR. JOU to Ms. Watanabe for work related injuries. FICOH then filed an Amended Complaint on August 21, 1990, also charging that DR. JOU rendered physical therapy to Ms. Watanabe through therapists who were not properly licensed to render physical therapy, and improperly billed FICOH in bad faith with erroneous representations that treatment was performed by duly licensed therapists (RA 248-251).

The Director of the DLIR appointed an advisory committee of physicians. DR. JOU objected to the appointment of Dr. Calvin C.M. Kam ("Dr. Kam"), stating merely that "We could not get a fair hearing from him" (RA 218). No Constitutional clause or Federal issue was raised as a part of DR. JOU's objection to Dr. Kam's appointment. DR. JOU also failed to make any objections based upon Federal takings or equal protection during this administrative tribunal.

On November 21, 1990, the Director of DLIR issued its Findings of Fact and Decision ("1990 Decision") (RA

419-423). The 1990 Decision indicated that the medical advisory panel "did not address issues relative to billings, reporting requirements and other technical allegations which do not require medical expertise. The panel recommended a sanction no more severe than a reprimand." (RA 419-420).

In the 1990 Decision, the Director found as follows:

> Dr. Jou knowingly and improperly used codes 97418 and 97419 which are reserved for services provided by registered physical therapist. Dr. Jou is entitled to billing for massage treatments provided by licensed masseurs, ultrasound, cold and hot pack and therapeutic exercises provided by registered physical therapists and services provided by physician assistants properly supervised. Masseurs, physical therapists and physician assistants must be licensed under Hawaii law. Dr. Jou shall be entitled to billings for services provided by licensed masseurs, registered physical therapists and physician assistants properly supervised, provided in combination, computed using codes 97418 or 97200, and 97419 and/or 97201, properly adjusted in accordance with administrative rule Section 12-13-45.
>
> * * * *
>
> Billing for services provided by licensed or unlicensed physician assistants properly supervised would be adjusted 60% and 50% respectively. Billings for massage treatments provided by unlicensed masseurs or physical therapy treatments provided by unlicensed physical therapists are not allowed.

(RA 422-423)(emphasis in original). The Director did not address any Federal due process, takings, equal protection or

Constitutional claims.

On November 28, 1990, DR. JOU filed a Notice of Appeal regarding the 1990 Decision (RA 428-429). On April 2, 1991, the Labor and Industrial Relations Appeals Board ("LIRAB") issued an Order remanding the matter to the Director of the DLIR to determine all billings that were not authorized or allowed by the Workers' Compensation Medical Fee Schedule, the correct amount that should have been billed by DR. JOU, and the amount of reimbursement due to FICOH (RA 546-547).

On October 4, 1991, a hearing was held to address the issues delineated in the Order of Temporary Remand (RA 812-814, 817). On October 30, 1991, the Director of DLIR filed a Supplemental to Decision dated November 21, 1990 ("1991 Supplemental Decision") (RA 816-818). According to the 1991 Supplemental Decision, FICOH requested reimbursement of $13,493.56 based on its records and an audit conducted by Accumed (RA 817). DR. JOU, through his counsel Mark Thomason, Esq., argued that the Accumed audit should be disallowed and requested time in which to respond. *Id.* Although Mr. Thomason was granted until October 15, 1991 in which to file his response, no response was filed. *Id.*

The Director, through the hearing officer, therefore reviewed the entire record and determined that "Dr. Jou will be allowed fees of $2,241.93 for services provided Pao Watanabe during the period August 31, 1987 through July 27, 1990, resulting in a reimbursable amount of $16,950.61 (payments made of $19,192.54 less $2,241.93)." *Id.* The stated figures are reflected in the hearing officer's calculations as shown in his worksheets (RA at "Others" document 5 Emerson Jou (Pao Watanabe); Complainant's

Exhibit 6 of Complainant's First Amended Exhibit List dated August 8, 2001).

On November 4, 1991, DR. JOU filed a second Notice of Appeal to the LIRAB (RA 819-820). Although a number of settlement and pretrial conferences were noticed since December, 1991, the appeal did not proceed to a trial *de novo* before the LIRAB until August 8, 2001. DR. JOU filed his Post-Trial Brief on September 10, 2001, including arguments that the DLIR Director's empanelment of Dr. Kam on the advisory panel constituted a due process violation (without reference to State or Federal Constitutions), and that the DLIR Director and Appeal Board's admission of FICOH's Accumed audit violated the Fifth and Fourteenth Amendments of the United States and Hawaii Constitutions because DR. JOU was not given the opportunity to examine its author (RA 1172-1176, 1170-1187, 1188-1223).

On December 17, 2001, the LIRAB issued its Decision and Order affirming the 1990 Decision and the 1991 Supplemental Decision (RA 1235-1253). The LIRAB concluded, based solely on Hawaii Revised Statutes and Hawaii Administrative Rules, that the advisory panel was properly convened. The LIRAB also found that the Director's calculations in the 1991 Supplemental Decision were not based on the Accumed report, and that the Director properly disallowed billings performed by those who were not properly licensed. The LIRAB did not pass on issues of due process or the Fifth and Fourteenth Amendments (RA 1249, 1251).

DR. JOU filed his Notice of Appeal to the Supreme Court and the Intermediate Court of Appeals ("ICA") of the State of Hawaii on December 27, 2001 (RA 1255-1276). In his Opening Brief filed May 6, 20[illegible]2 ("OB"), DR. JOU

argued that (1) the LIRAB and the DLIR Director's decision to empanel Dr. Kam on the advisory panel constitutes not only a due process violation, but an equal protection violation as well, and (2) the DLIR and LIRAB's use of Hawaii Administrative Rules in conflict with Hawaii Revised Statutes constituted a taking (OB 2-3, 15, 18, 29-30).

The ICA issued a Summary Disposition Order May 7, 2004, stating in relevant part:

> Specifically, Dr. Jou contends, "At least one decisionmaker relied on by the agency (Dr. Calvin [C.M.] Kam [(Dr. Kam)]), was personally and financially interested in his decision against [Dr. Jou], in violation of Article 1, Section 5 of the Constitution of the State of Hawaii, and the Fifth and Fourteenth Amendments to The United States Constitution ." Opening Brief at 2 (citation to appendix omitted). This argument is unavailing. Dr. Jou's appeal to the Appellate Board was a *de novo* proceeding...and nothing in the record indicates the Appellate Board relied upon the recommendations the advisory panel made to the Director.
>
> * * * *
>
> Dr. Jou also contends that the relevant provision of the [Hawaii Administrative Rule's Medical Fee Schedule] work a taking of his property without due process of law, "in violation of the Fifth Amendment of the U.S. Constitution and Article 1, Section 5 of the Hawaii Constitution[.]" Opening Brief at 27 (capitalization modified). Dr. Jou makes no detectable argument in support of this assertion, and thus fails his burden on appeal to prove the administrative provisions unconstitutional beyond a

reasonable doubt, and show the constitutional defect clearly, manifestly, and unmistakably.

See Summary Disposition Order May 7, 2004. It should be noted that the ICA's opinion made no reference to Federal laws beyond quotation of DR. JOU's claims, and discrediting the same based upon the laws of the State of Hawaii. *Id.*

On June 1, 2004, DR. JOU filed an Application for Writ of Certiorari in the Hawaii Supreme Court ("AWC"). Questions presented for review include the following:

A. Whether the State's conduct, approved by the ICA, penalizing the physician's practice and requiring additional licensure as a physical therapist is a regulatory taking, violating the Fifth and Fourteenth Amendments to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii Constitution?
B. Whether the ICA authorized the State, by its agency (LAB), to deprive Petitioner property without due process of law by permitting the use of a review board panelist who received payment prior to the proceedings for an IME on the same case?
E. Whether the ICA-approved conduct by the agency limiting the physician's scope of practice, and limiting the use of employees and products incident to the physician's services, constituted rule-making without due process, in violation of the 14th Amendment to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii State Constitution?
F. Whether the ICA's endorsement of the agency's conduct restricting the property rights of

> Petitioner violated Petitioner's rights to equal protection under the Fourteenth Amendment to The United States Constitution?[...]and whether the ICA's decision singled Petitioner out for treatment disparate from other physicians who employ licensed non physicians incident to their services?

(AWC 1-2). The Hawaii Supreme Court denied DR. JOU's Application on June 10, 2004. *See* Order Denying Application for Writ of Certiorari filed June 10, 2004.

DR. JOU now seeks review by yet another appellate court, again alleging that constitutional violations occurred because the last court did not rule in his favor. DR. JOU asks this Court to find the following:

1. The State of Hawaii's appointment of an allegedly biased advisory panel member, and the Hawaii State Judiciary's affirmation of the same, deprived DR. JOU of due process under the Fifth and Fourteenth Amendments, where nothing in the record indicates recommendations of the advisory panel were relied upon by the appellate board.
2. Hawaii State agencies and the Hawaii State Judiciary committed a regulatory taking by prohibiting DR. JOU from charging patients, under Hawaii's worker's compensation statutes, for physical therapy provided by staff not licensed to provide such services.
3. Hawaii State agencies and the ICA treated DR. JOU differently than other physicians employing third-parties to provide services incident to medical treatment, when they barred DR. JOU from billing for physical therapy provided through

unsupervised staff not licensed to provide physical therapy, thereby violating DR. JOU's Fourteenth Amendment equal protection rights.

4. The Hawaii State Judiciary violated DR. JOU's due process rights and/or committed a regulatory taking when biased Hawaii appellate court judges ruled against him and allegedly in the interest of a purportedly stacked Judicial Selection Commission.

SUMMARY OF REASONS FOR DENYING THE PETITION

This Court has no jurisdiction to review decisions of the Hawaii State courts and agencies below. Failing to meet the jurisdictional requirements of 28 U.S.C. 1257(a), DR. JOU did not properly raise Constitutional issues below, nor did Hawaii's courts pass upon any Constitutional questions. Even assuming DR. JOU met jurisdictional requirements, there is no compelling reason for the court to grant review as the state courts have not decided any questions of Federal law. Finally, DR. JOU's claims are substantively devoid of merit.

ARGUMENT

I. THERE IS NO JURISDICTION FOR THIS COURT TO REVIEW DECISIONS ISSUED BY HAWAII APPELLATE COURTS AND AGENCIES

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. 1257(a) (emphasis added). Federal courts are courts of limited jurisdiction empowered to hear only those cases which have been entrusted to them by Congressional grant of jurisdiction, and they have no power to review judgment of state courts, except where a substantial Federal question is involved. *Reich v. Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974), *aff'd on other grounds,* 527 F.2d 666 (7th Cir. 1975). Under 28 U.S.C. 1257, jurisdiction is further limited to review of final judgments or decrees rendered by the highest court of a State in which a decision could be had. *Johnson v. California*, __ U.S. __, 124 S.Ct. 1833, 1834, 158 L. Ed. 2d 696 (2004).

A. DR. JOU's Claims Were Not Properly Presented Below So As To Give This Court Jurisdiction for Review

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 95 L.Ed. 2d 474 (1987).

The proper time to assert Federal questions so as to give the United States Supreme Court jurisdiction on writ of error to state court, is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L.Ed. 480 (1903). The Federal question relied upon to confer jurisdiction on Supreme Court cannot first be raised in Supreme Court of United States. *Spies v. Illinois,* 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed 80 (1887).

The proper way to assert a Federal question is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *McGrew*, 188 U.S. at 308. A clause of the Constitution or law of Congress must have been specified. *New York C. R. Co. v. New York,* 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902).

DR. JOU did not properly raise any of his claims so as to invoke the jurisdiction of the United States Supreme Court. Generally, claims regarding constitutional violations are properly raised before the trial court. *Fujimoto v. Au,* 95 Haw. 116, 19 P.3d 699 (Haw. 2001). The proper time to

raise claims for due process violations associated with bias of judges is at the trial court level. *Poka v. Holi*, 44 Haw. 483, 357 P.2d 110 (1960); *Hawaii Roofing Co. v. Felix*, 49 Haw. 578, 426 P.2d 298 (1967). Similarly, the suggestion of an advisory panel member's bias must be made on the record at the administrative hearing. *HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs*, 69 Haw. 135, 141, 736 P.2d 1271, 1274 (1987).

With respect to DR. JOU's claims of impartiality on the part of Dr. Kam and consequential due process violations, such claims arose at the time of the DLIR hearings. However, charges alleging a constitutional violation were first made on appeal to the LIRAB (RA 1173), after the DLIR hearings had concluded. As well, DR. JOU alleged that Hawaii appellate court judges were biased and due process rights were violated, only after their rulings had been issued and only on appeal thereto. *See* Petition for Writ of Certiorari at p. 20-22.

Review of administrative decisions is confined to issues properly raised in the record of the administrative proceeding. *HOH Corp.*, 69 Haw. at 141, 736 P.2d at 1274. DR. JOU's prohibition from billing for services provided by unlicensed staff was first pronounced in the decision issued by the DLIR Director (RA 419-423). The prohibition was not alleged to be a regulatory taking until appeal to the ICA (OB 15). Similarly, DR. JOU neglected to raise his equal protection allegations related to disparate treatment by the DLIR, during proceedings before the DLIR. In fact, the argument was not made until DR. JOU's application for Writ of Certiorari to the Hawaii Supreme Court (AWC 2). Because DR. JOU was required to raise his regulatory taking and equal protection claims during the DLIR proceedings, but failed to do so until the appeal, this Court is unable to review the same on writ of error.

B. The Hawaii Supreme Court Did Not Pass on DR. JOU's Constitutional Claims

For the Supreme Court to review a decision of a state court, it must appear affirmatively from record not only that a Federal question was presented to highest court of state having jurisdiction but that its decision of the Federal question was necessary for determination of case. *Wilson v. Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946). It is not enough to give the United States Supreme Court jurisdiction over judgment of a state court for the record to show that a Federal question was argued or presented to that court for decision; it must appear that decision of the Federal question was necessary to the determination of cause and that it was actually decided, or that judgment, as rendered, could not have been given without deciding it. *First National Bank v. Estherville,* 215 U.S. 341, 54 L.Ed. 223, 30 S.Ct. 152 (1910).

Accordingly, the U.S. Supreme Court has no jurisdiction to review a state decision resting on adequate and independent non-Federal grounds; the decision will not be reviewed even though the state court may have also summoned to its support erroneous views of Federal law. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). Where a decision might have been rendered on either Federal ground or state ground, the Supreme Court will not review the Federal ground on appeal as of right under 28 U.S.C. § 1257 unless the state ground is too insubstantial or insufficient to justify the result below. *Lamb Enterprises, Inc. v. Kiroff*, 399 F.Supp. 409 (N.D. Ohio 1975), *revd on other grounds* 549 F.2d 1052 (6th Cir. 1977), *cert. denied* 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed. 2d 1064 (1977).

Jurisdiction in this matter is deficient because the Hawaii Supreme Court did not pass on DR. JOU's constitutional questions, based upon Federal grounds or otherwise. When an issue has not been the subject of judgment from the highest state court, review by the U.S. Supreme Court would be premature and the writ of certiorari should be dismissed. *California v. Rooney*, 483 U.S. 307, 313, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987). When the highest state court fails to pass upon a Federal question, such as the case when the highest state court denies review without opinion, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 95 L. Ed. 2d 474 (1987).

The Hawaii Supreme Court denied DR. JOU's Application for Writ of Certiorari without issuing an opinion on June 10, 2004. No Federal questions were passed upon on Federal grounds. *See* Order Denying Application for Writ of Certiorari filed June 10, 2004. Even if this Court could review the ICA's written opinion, Constitutional issues therein were dismissed as insubstantial and the LIRAB's decision was validated on state law grounds. *See* Summary Disposition Order May 7, 2004. Thus, there is no final judgment rendered by the highest court of the State of Hawaii for this Court to review.

II. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI FOR QUESTIONS OF STATE LAW

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of

certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important Federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important Federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of Federal law that has not been, but should be, settled by this Court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SCR Rule 10 (emphasis added). Guided by SCR Rule 10, it is clear that the issues raised by DR. JOU's Petition for Writ of Certiorari are not of the character necessary for United States Supreme Court review.

It is equally clear that the DLIR, LIRAB, ICA and Hawaii Supreme Court did not decide any question of Federal law. Rather, all issues addressed were resolved based on Hawaii State law. DR. JOU also asserts only that constitutionally valid Hawaii State laws were erroneously applied.

III. DR. JOU'S CLAIMS HAVE NO MERIT

Examining DR. JOU's individual contentions, there is no basis in law or fact for a ruling in his favor. Substantively, DR. JOU's claims have no merit.

A. There is No Due Process Right to Unbiased Advisory Panel Members

DR. JOU argues that a due process violation resulted when Dr. Kam was allowed to serve on the advisory panel to the hearing conducted by the Director of the DLIR. In support of this proposition, DR. JOU first argues that errors regarding the legitimacy of judges and jurors are structural, and therefore prejudice need not be proved. Assuming this principle is true, it is nonetheless inapplicable to the facts of our case. Dr. Kam was neither an adjudicator nor fact finder. Dr. Kam was merely one of three advisory panel members whose report the adjudicator and fact finder were at liberty to consider or ignore.

DR. JOU next argues that special masters are subject to the same standards as judges, therefore advisory panel members should be held to the same standard as adjudicators. DR. JOU, however, cites no authorities that analogize or compare advisory panel members to special masters, but

merely reasons that because they are both subject to the control of an adjudicator, they should be held to the same standard as the adjudicator. There is no weight to this contention.

Finally, DR. JOU maintains, citing *Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 173 (1981), that since court-appointed psychiatrists enjoy judicial immunity like advisory panel members, the standards applicable to judges applies equally to advisory panel members. DR. JOU's logic is seriously flawed because the cloak of judicial immunity does not transform a court-appointed psychiatrist into an adjudicator. Therefore, the bias of an advisory panel is not to be judged in the same manner as that of an adjudicator.

Instead, the proper standard applicable to evaluations of alieged biases in the context of administrative hearings and advisory personnel is found in the *NLRB v. Botany Worsted Mills,* 133 F.2d 876 (3rd Cir. 1943). There, a complaint was made against an employer for unfair labor practices. It was alleged that the employer's due process right were violated because the National Labor Relations Board's trial examiner was previously employed by the NLRB and thereby biased.

> The trend of the [employer's] whole argument presses too hard the analogy between trial examiner and Board and trial court and appellate court. It is the Board, not the trial examiner, which is charged by the Act with both the power and responsibility of making findings of fact and the decisions thereon. The trial examiner [...] makes findings and recommendations presented to the Board as an intermediate report. Unlike judges, trial examiners may be substituted at the will of the Board during the course of either representation or complaint proceedings. In both the

> representation and complaint proceedings all the pleadings, notices, rulings, orders, stenographic records, exhibits, documents and depositions constitute the record before the Board. The trial examiner's intermediate report is merely advisory and the Board may accept or reject it. Indeed, the latest commentators upon the subject have said that the report of the trial examiner "is to be regarded as in the nature of an 'inter-office memorandum,' whose presence or absence does not or should not affect the result of the case being determined by the agency tribunal." Pike and Fischer, Administrative Law, § 63a.16. It is the Board, therefore, which has the final responsibility both under the terms of the statute and the decisions of the courts construing and applying it. [...] If bias is charged against it or one of its members, a different problem arises and this court has, in the past, taken action it deemed appropriate under the circumstances.

Botany Worsted Mills, 133 F.2d at 882-883.

As in *Botany Worsted Mills,* our case presents an advisory report that was provided as an intermediate report to the decision maker. Dr. Kam was an advisory panel member; one of three members. He drafted a report which the DLIR Director was at liberty to use or disregard. Final responsibility for the decision rested with the Director and not Dr. Kam. As noted by the ICA's Summary disposition order, "the appeal to the [LIRAB] was a *de novo* proceeding...and nothing in the record indicated that [LIRAB] relied upon the recommendations the advisory panel made to the Director [below]." *See* Summary Disposition Order May 7, 2004, p.2.

DR. JOU has made no showing that Dr. Kam participation on the advisory panel resulted in a due process violation. Indeed, he cannot because the Director did not adopt Dr. Kam's more lenient recommendation.

B. DR. JOU Has Not Been Foreclosed From Practicing Physiatry and He Has Not Been Deprived of Liberty or Properly Interests

DR. JOU's takings claim rests on the argument that the decisions below "forces licensed physicians to employ physical therapists licensed in Hawaii as a condition to providing some of the medical services listed in the state's medical fee schedule." DR. JOU misperceives and mischaracterizes the decisions below.

The DLIR Director's decision did not prohibit DR. JOU from providing physical therapy unless a licensed physical therapist was employed. Instead, DR. JOU was only prohibited from charging for physical therapy services pursuant to Hawaii's workers' compensation statutes, and only where such services were performed by unlicensed staff without supervision. The Director's decision has not restricted DR. JOU's ability to provide physical therapy outside of Hawaii's workers' compensation statutes. The Director's decision also permits DR. JOU to receive payment for physical therapy he himself provides or directly supervises, pursuant to Hawaii's workers' compensation scheme. Therefore, the issue is whether DR. JOU was deprived of a property interest when the State prohibited him from charging patients for physical therapy services where such services were provided by an unsupervised and unlicensed staff member, in violation of Hawaii's workers' compensation statutes.

Liberty includes the right "to work for a living in the common occupations of the community." *Long Grove Country Club Estates, Inc. v. Long Grove*, 693 F. Supp. 640, 662 (D. Ill., 1988). But it is well established that in the exercise of police power, the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. *Smith v. Texas*, 233 U.S. 630, 638, 34 S.Ct. 681, 58 L. Ed. 1129 (1914). The Supreme Court has held that even the loss of one's job does not amount to a deprivation of liberty, as long as the plaintiff remains free to locate alternate employment. *Long Grove*, 693 F. Supp. at 662.

The Supreme Court in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976) makes clear that to find the deprivation of a property interest in an alleged deprivation of right to practice one's profession, an individual's legal rights or status must have been removed or significantly altered. *Goulding v. Feinglass*, 811 F.2d 1099, 1102 (7th Cir. 1987). There is no deprivation of a property right to work where such individual has not lost the right to practice his profession, his license to practice has not been revoked or suspended, and he is still currently practicing. *Id.* at 1103. In essence, no liberty interest is impaired where an individual is not foreclosed by a legal barrier from practicing his profession.

Despite his extreme assertions, DR. JOU has not been prohibited from providing physical therapy services, nor has he lost the right to practice physiatry, with or with a licensed therapist. He maintains the right to practice any physical therapy that <u>he himself</u> performs as a part of physiatry treatment. DR. JOU's license to practice physiatry has not been revoked, and DR. JOU is currently practicing physiatry. DR. JOU therefore has not been subject to a liberty or property infringements.

C. DR. JOU Was Treated Like to Other Physicians Similarly Situated

DR. JOU next argues that the courts and agencies below treated him differently from similarly situated physicians who provide services through employees incident to treatment.

There is a category of equal protection claims in which government officials prosecute individuals for vindictive or otherwise illegitimate reasons. *Esmail v. Macrane*, 53 F.3d 176, 178-80 (7th Cir. 1995). "To succeed on a claim of selective prosecution, the defendant has a two-part burden. He must establish both that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution . . . was based on an impermissible motive." *United States v. Greene*, 698 F.2d 1364, 1368 (9th Cir. 1983).

DR. JOU has failed to make an adequate showing of either prong of the test enumerated in *Greene*. DR. JOU offers no evidence that other physicians have charged patients under Hawaii's workers' compensation scheme for unsupervised physical therapy services conducted by unlicensed employees (or those similarly situated), without being prosecuted for such conduct. Far short of providing evidence, DR. JOU has not even suggested an improper motive for the alleged discriminatory prosecution. There is not a scintilla of evidence to support DR. JOU's equal protection claim.

D. Hawaii's Judicial Selection Commission is Not "Stacked" and Ruling in the Interests of a Minority of the Judicial Selection Commission Would Not Secure Judges' Retention

DR. JOU alleges that the State of Hawaii committed a regulatory taking of property rights to practice his profession, subject to *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 396-398, 43 S.Ct. 158 (1922), when the ICA formulated its decision in favor of FICOH. DR. JOU alludes to improper rulings by ICA judges, for the purposes of furthering their retention by appeasing three members of Judicial Selection Commission who allegedly have strong ties to Hawaii's health and property casualty insurers. Although his argument is unclear and disjointed, DR. JOU may also be implicating the State's composition of the Judicial Selection Commission itself.

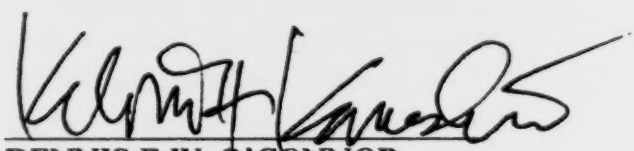
Petitioner's allegations regarding ICA judges and the Judicial Selection Commission are based upon speculation and conjecture. The Judicial Selection Commission is comprised of nine members. Two are elected by the Hawaii Bar Association; Two are elected by the Governor; Two are elected by the Senate President; Two are elected by the House of Representative Speaker; and, One is selected by the Chief Justice. It is ridiculous for Petitioner to allude to a "packing" of Hawaii's Judicial Selection Commission, where only three of nine Commission members are alleged to "earn all or a substantial amount of income from the state health and property casualty insurers." Even if the three members did have affiliations with insurance carriers as alleged by Petitioner, three out of nine members could hardly be considered "packing" or "filling" the Commission with members having an interest in insurance carriers. It is even more outrageous for Petitioner to allude that judges sitting on

the intermediate court of appeals would write an opinion in favor of insurance carriers, merely to appease three of nine Commission members, and thus be able to somehow secure their retention.

Petitioner also fails to show that a taking occurred. A taking is a governmental acquisition of private property for which the state is required to provide just compensation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 638, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). As discussed above, Plaintiff cannot identify any personal property that that was taken from him. As stated above, the ICA did prohibit DR. JOU from practicing his profession by revoking his license or otherwise. There simply was no taking.

CONCLUSION

For the foregoing reasons, Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. respectfully requests that DR. JOU's Petition for Writ of Certiorari be denied.



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CASE NUMBER: C9001
COMPLAINT DATE: March 5, 1990

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Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following

APPENDIX A

FINDINGS OF FACT

On March 5, 1990, First Insurance Company of Hawaii, Ltd., filed a complaint under Section 386-27, HRS, against Emerson M. F. Jou, M.D., M.P.H. alleging violations of Sections 386-27, 386-96, and 453-8, HRS; Sections 12-10-71, 12-13-1, 12-13-13, 12-13-30, 12-13-36, 12-13-38, 12-13-40, 12-13-80, 12-13-91, and 12-13-95 of the Workers' Compensation Administrative Rules, relative to treatments provided to Pao Watanabe (CN: 28711296). By letter dated March 12, 1990, Dr. Jou filed with the director a written statement in response to the complaint. First Insurance Company of Hawaii, Ltd., filed with the director an amended complaint on August 21, 1990. A hearing on the complaint was held on October 3, 1990.

Specifically, the complaint alleges that while treating Pao Watanabe, for an industrial injury to her back on March 11, 1987, Dr. Jou:

1. persistently refused to consider the recommendations made by board certified and qualified health care providers to refer claimant for psychotherapy;

2. provided passive physical treatment no longer required by the nature of the injury;

3. failed to make a diligent effort to secure all available medical information from claimant's previous physicians;

4. failed to comply with the responsibilities of an attending physician;

5. allowed concurrent physical therapy treatments without prescription;

6. allowed unlicensed or unqualified individuals to treat while not directly controlled or supervised by the attending physician;

7. in bad faith submitted misleading billings;

8. refused to treat the injured worker with valid reason;

9. failed to file reports as required by Section 386-96, HRS, Section 12-13-80, and related Administrative Rules;

10. failed to properly annotate reports filed with the Director;

11. charged fees for care of the industrial injury to the injured employee;

12. failed to certify that charges for supplies were required or prescribed for the industrial injury.

Dr. Jou indicated that the patient suffered chronic pain due to muscle strain and not due to psychogenic factors. Dr. Jou indicated that he does not object to psychological intervention and did offer psychological referral to the claimant which was always declined. He also indicated he was granted authorization to provide treatments and the patient responded to the physical therapy treatment. Dr. Jou felt that he obtained sufficient medical information to properly diagnose and treat the patient. He also felt that he provides his staff with proper prescriptions and special instructions, supplemented with frequent verbal and written communication regarding patient responses. Dr. Jou indicated that he submitted properly annotated medical reports and did not bill or demand payment from the patient for care related to the industrial injury.

The employer alleges that Dr. Jou was aware of claimant's psychological problems and had numerous medical opinions from qualified health care providers to include Roy Sam, M.D., Calvin C. M. Kam, M.D., Francy Mateus, M.D., and Vincent Onorato, Ph.D. who indicated the need for psychological evaluation and treatment. Employer also stated that Dr. Jou submitted at least 12 plans to provide

the same type of passive physical therapy treatment at the same frequency for over 2 years without improvement in the patient's condition and which was not required by the nature of the injury. Drs. Sam, in a report dated October 21, 1988, Kam, in reports dated February 3, 1989 and September 4, 1989, and Mateus, in a report dated August 30, 1989, indicated the patient does not require further passive physical therapy treatment. Employer further alleges that in failing to obtain important and relative medical information from other health care providers, Dr. Jou was not aware of the EMG test performed on August 13, 1987 which indicated no signs of radiculopathy and a bone scan performed by the Hickam Dispensary on October 13, 1987 which indicated normal results. Dr. Jou was also not aware of depression treatments provided in 1982 and 1988.

The employer also alleges that Dr. Jou failed to fulfill his responsibilities for treating and overall coordination of services provided by nonphysicians. The employer alleges Dr. Jou failed to file and failed to have nonphysicians file required reports on a timely basis and with proper annotations as required under Section 386-96, HRS, and administrative rule Sections 12-10-71 and 12-13-80. No documentation was kept to measure the patient's progress which would be necessary to determine the efficacy of ongoing care. No written prescriptions or reports from the physician and therapists who provided services were received by the employer. The patient indicated during a deposition that services were performed by unlicensed individuals while not under the direct control and supervision of Dr. Jou. The employer further indicated that Dr. Jou incorrectly billed for services provided by non-licensed individuals. The employer also alleges that Dr. Jou violated administrative rule Section 12-13-l3(a)(11) by billing both the patient and employer for services rendered on 9/10/88 - 10/20/88, 11/9/88 - 11/18/88, and 1/3/8 - 1/6/89. Finally the employer alleges that Dr. Jou failed to certify his prescription for TENS unit on September 21, 1987.

A medical advisory panel, consisting of David Y. Kimura, M.D., Calvin C. M. Kam, M.D., and Bernard M. Portner,

M.D. was convened on July 3, 1990. The panel noted that although Pao Watanabe requires psychiatric treatment, Dr. Jou did offer this referral, which the claimant refused. The panel determined that "ultrasound and massage treatments have been excessive and reached the point of becoming inappropriate and unnecessary long ago." However the panel noted that these treatments were approved by the Department of Labor. Dr. Kam indicated that a responsible health care practitioner would not continue such treatments which result in no health care benefit. The panel felt that obtaining prior health care records is within the discretion and judgment of the physician and in this case may be considered an error in judgment since this information would aid in the assessment and treatment of the patient. The panel felt that "the therapist under Dr. Jou's supervision should be required to do the same recording and reporting as a therapist not associated with the physiatrist." Dr. Kam also noted that Dr. Jou "was not able to provide any further health care data relative to what was done by his staff, the benefits thereof". The panel did not address issues relative to billings, reporting requirements and other technical allegations which do not require medical expertise. The panel recommended a sanction no more severe than a reprimand.

All parties agreed that both parties would be allowed to file final position papers with the department on October 17, 1990. A Supplemental Complaint and Position Statement was submitted by First Insurance Co. of Hawaii on October 17, 1990. No additional statements were filed by Dr. Jou.

Upon review of the entire record, we find that Dr. Jou acted in bad faith and is in violation of provisions of Section 386-27, HRS, and the related rules. The advisory panel of medical experts clearly indicated that Dr. Jou provided ultrasound and massage treatments which were inappropriate and unnecessary. The fact that additional treatments were authorized does not relieve Dr. Jou of his responsibility to provide only treatments as required by the nature of the injury.

We further find that Dr. Jou violated administrative

rule Sections 12-13-13(a)(3), (4), and (8) by allowing unlicensed individuals to provide physical therapy treatments. Dr. Jou knowingly and improperly used codes 97418 and 97419 which are reserved for services provided by registered physical therapist. Dr. Jou is entitled to billings for massage treatments provided by licensed masseurs, ultrasound, cold and hot pack and therapeutic exercises provided by registered physical therapists and services provided by physician assistants properly supervised. Masseurs, physical therapists and physician assistants must be licensed under Hawaii Law. Dr. Jou shall be entitled to billings for services provided by licensed masseurs, registered physical therapists and physician assistants properly supervised, provided in combination, computed using codes 97418 or 97200, and 97419 and/or 97201, properly adjusted in accordance with administrative rule Section 12-13-45. For example, billing for a patient receiving hot and cold packs, ultrasound, therapeutic exercises by a registered physical therapist for 30 minutes and massage by a licensed masseur for 15 minutes, in combination in 1988, would be computed as follows:

97418(PT)	1.0 unit X 23.27	=23.27
97419(PT)	.4 unitsX 23.27	= 9.31
97201(Massage)	.4 unitsX 23.27	= 9.31
		=41.89 = 41.90 X 1.04
		= $43.58

Billing for services provided by licensed or unlicensed physician assistants properly supervised would be adjusted 60% and 50% respectively. Billings for massage treatments provided by unlicensed masseurs or physical therapy treatments provided by unlicensed physical therapists are not allowed. Dr. Jou shall forfeit or reimburse the employer for all billings or payments made in excess of that allowed by the Workers' Compensation Medical Fee Schedule.

In addition, Dr. Jou is fined $7,000.00 payable to the Workers' Compensation Special Compensation Fund, for providing unnecessary treatments, for allowing unlicensed individuals to provide massage and physical therapy, for

failure to provide proper supervision, failure to prepare or have prepared appropriate reports to indicate the nature and efficacy of the treatment provided to Pao Watanabe, failure to submit required reports and repeated submission of inaccurate and misleading bills.

Thereupon the Director makes the following

DECISION

1. Pursuant to Section 386-27, HRS, Emerson M. F. Jou, M.D. shall reimburse said employer for billings for medical care, services and supplies provided to Pao Watanabe relative to her injury on March 11, 1987 (CN: 28711296) not authorized or computed in accordance with the Workers' Compensation Medical Fee Schedule. In accordance with Section 12-13-13(a)(14) of the Workers' Compensation Medical Fee Schedule Administrative Rules, disallowed fees shall not be chargeable to Pao Watanabe.

2. Pursuant to Section 386-27, HRS, Emerson M. F. Jou, M.D. shall be fined $7,000.00, which is immediately payable to the Workers' Compensation Special Compensation Fund.

BY ORDER OF THE DIRECTOR, NOVEMBER 21, 1990.

_____

Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.